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IN THE

Supreme Court of the United States

October Term, 1952
No. 641.

PARTMAR CORPORATION and FANCHON & MARCO, INC.,
Petitioners,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION.

Respondents respectfully submit that the petition of Partmar Corporation and Fanchon & Marco, Inc., for Writ of Certiorari should be denied. Said petition presents no question properly calling for the exercise of this Honorable Court's discretion, and the decisions of the courts below were clearly correct.

QUESTIONS PRESENTED.

1. Whether a finding made by the District Court that the theatre lease and film franchise under which petitioners operated a first run motion picture theatre neither "constituted any part of, nor were they or any of them entered into as a result of any agreement, combination or conspiracy of any kind whatsoever between Paramount and any other

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person or persons," which said finding was made as part of a decision and judgment denying restitution of said theatre to respondent, Paramount Pictures Theatres Corporation and declaring said lease and franchise "valid subsisting agreement(s) in full force and effect," is *res judicata* against petitioners and precludes recovery on their counterclaims seeking damages for the alleged imposition of the requirements of said franchise and lease upon Partmar as a part of a conspiracy in restraint of trade.

2. Whether petitioners are estopped to claim that the terms of said lease and franchise were part of a conspiracy by their having successfully asserted in defense of respondent's suit that they were not.

3. Whether petitioner's counterclaims were properly dismissed after notice and upon hearing settling findings, conclusions and judgment embodying such dismissal since there could be no genuine issue as to the material fact of a connection between the conspiracy alleged and the terms of said franchise and lease, the lack of such connection being *res judicata.*

4. Whether the dismissal of said counterclaims could in any event affect the substantial rights of petitioners (28 U. S. C. A., Sec. 2111), in view of their inability to recover if permitted to go to trial thereon.

The above are the only questions properly involved in a review of the decision of the courts below. As will hereinafter appear, the other questions attempted to be raised by petitioners would be appropriate in an appeal from the judgment denying respondents restitution of possession of the theatre and adjudicating the validity of the lease and franchise but have no place in the consideration of the limited appeal taken by petitioners.

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STATEMENT OF THE CASE.

Petitioners have successfully defended an action for unlawful detainer and declaratory relief brought by respondents and have obtained a final judgment declaring their right to continue in occupancy of a theatre leased from one respondent and to performance of a film franchise agreement with another respondent [Tr. 110, Par. III, 1, 2] on the ground *urged by petitioners* that said lease and franchise constituted no part of and were not entered into as a result of any agreement, combination or conspiracy of any kind whatsoever between said respondents and any other person or persons. While enjoying the benefits of these adjudications these same petitioners seek by their counterclaims to recover damages from respondents on the ground that alleged excessive terms of said franchise and lease were imposed pursuant to and were part of a conspiracy between respondents and other motion picture producers, distributors and exhibitors. Both the District Court and the Court of Appeal have held that petitioners cannot do so. The correctness of this determination is the only substantive question that has ever been involved in the review of the judgment.

Respondents do not believe that the "Statement" contained in the petition correctly states the facts. Accordingly, the following statement of the facts is submitted.

The complaint contains five causes of action. The first two, in unlawful detainer, seek restitution of possession of a theatre leased by respondent, Paramount Pictures Theatres Corporation, to petitioner Partmar. The third seeks recovery of the balance due on a note which was to mature upon termination of the lease between these parties. The fourth seeks enforcement of a guarantee of performance of the obligations of the lease by

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petitioner Fanchon & Marco, Inc. The fifth is a cause of action for declaratory relief. It seeks an adjudication of a controversy between the parties as to whether the lease was lawfully *terminated by reason of termination of the franchise* [Tr. 3-26, 24].

As stated in the complaint and as found by the District Court [Tr. 3-11, 101] the theatre which was the subject of the lease was, when the lease was executed, owned by respondent Paramount Pictures, Inc., which was then engaged in producing, distributing and exhibiting motion pictures. Said theatre was owned and had been operated for the exclusive purpose and object of having a high-class motion picture theatre centrally located in the City of Los Angeles, to be used for the first run "showcase" exhibition of all motion pictures produced by it. Said respondent concurrently leased the theatre and granted a franchise for the exhibition of Paramount pictures first run to petitioner Partmar, an independent exhibitor unaffiliated with any distributor of motion pictures [Tr. 101]. If any unlawful restraints had in fact been imposed by said lease and franchise, petitioners were the ones who would have benefited thereby. Petitioner Partmar was by said franchise granted the first run exhibition of all the product of respondent Paramount Pictures, Inc., in the Los Angeles area [Tr. 104, 247] and was given clearance over all other exhibitors [Tr. 103, 270]. This relationship commenced in 1933 and was by a series of similar contracts continued into 1952 [Tr. 37].

The importance of such a "showcase" theatre to the distributor was fully set forth in the complaint [Tr. 6-8]. To insure that the theatre would be available as a "showcase" for the product of respondent Paramount Pictures,

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Inc., it was provided in the franchise that said franchise was terminable upon termination of the lease [Tr. 289], and provided in the lease that said lease should be terminable in the event of termination of the franchise [Tr. 211-212]. The complaint alleged the termination of the franchise [Tr. 17] and the consequent termination of the lease [Tr. 17-18].

Petitioners answered the complaint and filed counterclaims. In the first, second and fourth counterclaims which are the subject of this petition, petitioners alleged the existence of the conspiracy which was the subject of the judgment in *United States v. Paramount Pictures, Inc.*, and alleged that excessive terms were imposed in both the film franchise and the theatre lease pursuant to said conspiracy [Tr. 36-42]. No facts supporting recovery on any other basis were alleged.

By order dated April 26, 1948, the District Court ordered separate trial of the first, second and fifth causes of action to be followed by a subsequent trial of other elements of the case, including petitioners' counterclaim [Tr. 44-45]. The trial which was conducted, commencing November 8, 1950, was therefore a trial of the first, second and fifth causes of action of the complaint.

The issues at this trial were: (1) Did the injunction in *United States of America v. Paramount Pictures, Inc.*, enjoin further performance of the franchise thus bringing into effect the condition contained in the lease ending the tenancy in the event of such termination? (2) Was such franchise agreement, *regardless of whether its performance was enjoined* by the decree in *United States of America v. Paramount Pictures, Inc.*, illegal and void and therefore terminated in law, thus giving rise to the right to terminate the tenancy asserted by respondents or thus

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rendering the lease likewise illegal and void as part of an inseverable contract.

The result of the trial was a judgment for petitioners on the first and second causes of action [Tr. 109-111], and a declaration of the rights and duties of the parties on the fifth cause of action.

Paragraph I of the judgment adjudged and decreed that respondent Paramount Pictures Theatres Corporation take nothing by the first and second causes of action (unlawful detainer) of the complaint, and consequently that petitioner Partmar Corporation remain in possession of the theatre [Tr. 110].

Paragraph III of the judgment adjudged and decreed that the rights and duties of the parties be declared as follows:

> (a) The franchise agreement between respondent Paramount Pictures, Inc., and petitioner Partmar Corporation "is a valid and subsisting agreement in full force and effect" [Tr. 110], and
>
> (b) That the lease between respondent Paramount Pictures Theatres Corporation and petitioner Partmar Corporation "is a valid and subsisting agreement in full force and effect" [Tr. 110-111].

Paragraph II of the judgment dismissed petitioner's counterclaims [Tr. 110].

Essential to the judgment sustaining the validity of the franchise agreement and of the lease was the conclusion that each of the said agreements "is in all respects legal" [Tr. 106-107]. The court had found [Tr. 96-97] that, although two documents were executed, the franchise and lease constituted in fact one inseverable agreement. The illegality, therefore, of the franchise portion thereof would

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have compelled the conclusion that the lease was illegal and that petitioner Partmar was in possession without right. In any event the court could not as it did [Tr. 110] decree the rights and duties of the parties as including continued performance of the lease and franchise "in full force and effect," without finding them in all respects lawful.

Respondents had demonstrated to the court in the course of the trial several respects in which the provisions of the franchise agreement would if entered into as a part of, or as a result of a conspiracy or any agreement with anyone other than petitioners alone, constitute violation of the antitrust laws. The District Court therefore could only have concluded that said franchise, and consequently said lease were valid by determining that said agreements were not made in conjunction with any other person than petitioners, and were not a result of any combination or conspiracy of any kind whatsoever. Petitioners urged just this in defense of respondents' claims [Tr. 47, 52, 56-57, 58]. In response to this urging the District Court made the following finding [Tr. 103-104]:

> "20. Paramount, not in conjunction with any other major studio, entered into the franchise agreement which gave to Partmar the right to exhibit the first run features of Paramount in the City of Los Angeles. Neither said franchise agreement, nor said lease, nor any amendment to either of them constituted any part of, nor were they nor any of them entered into as a result of any agreement, combination or conspiracy of any kind whatsoever between Paramount and any other person or persons, nor between Partmar and any other person or persons."

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The District Court did not thereby find as intimated by petitioners (Pet. 26) that the conspiracy which was the subject of the judgment in *United States v. Paramount Pictures, Inc.*, did not exist, only that the particular agreements between petitioner Partmar and respondents were not a part of or affected by it, or any other conspiracy.

The District Court recognized of course, that this finding was fatal to petitioners' counterclaims, since they were based solely on the contention that said conspiracy had been implemented by the lease and franchise. This conclusion was stated in the written Memorandum Of Opinion [Tr. 94]. In this Opinion and by an appropriate conclusion of law [Tr. 107, Concl. 11] it is indicated that the above quoted finding precludes petitioners from asserting that there was a connection between the conspiracy alleged in the counterclaims and these contracts, and that therefore it would not be necessary to take evidence on such counterclaims.

Subsequent to the filing of this Opinion both parties submitted proposed findings of fact and conclusions of law. Those submitted by petitioners did not embody a conclusion that the counterclaims should be dismissed. Those proposed by respondents, which were with minor revisions accepted by the court, fully stated the conclusion that the counterclaims should not proceed to trial [Tr. 107-108] and the findings of fact which supported this conclusion. The matter of settling the findings, conclusion and judgment came on for hearing before the District Court on June 18, 1951. Counsel for petitioners appeared and vigorously resisted the adoption of the findings and conclusions proposed by respondents and accepted by the court and the judgment dismissing the counterclaims [Tr. 143-147]. At the conclusion of this hearing

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the court announced its acceptance of the findings, conclusions and judgments submitted by respondents and made its order accordingly.

Petitioners appealed from the portion of the judgment of the court dismissing the counterclaims and from no other part of said judgment [Tr. 111]. Though petitioners clearly had a right to a broader appeal, *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U. S. 241 (1939), they understandably did not wish to risk, by testing the legality of their bases, the substantial benefits which the other portions of the judgment afforded them. Consequently, the sole question involved in their appeal was whether petitioners' first, second and fourth counterclaims were properly dismissed, and if they were not properly dismissed, whether any substantial rights of petitioners had thus been affected. Errors specified by petitioners allegedly committed in the trial of the first, second and fifth causes of action (Pet. 2-3, Questions 5, 6, 7 and 10) are beyond the reach of any court since the judgment in said respects has become final and the rights of petitioners to the benefits of such judgment regardless of its correctness conclusively established. Any discussion of the merits of petitioners' appeal must therefore deal with the question of the effect of the final judgment on the first, second and fifth causes of action upon the right of petitioners to maintain their first, second and fourth counterclaims.

The Court of Appeals unanimously agreed with the District Court that petitioners could not accept the benefits of the judgment on the first, second and fifth causes of action without being bound by the findings upon which it was based, and affirmed without further statement of reasons [Tr. 432].

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ARGUMENT.

I.

The Petition Seeks Only to Have This Court Correct Alleged Error in Two Lower Courts. There Is No Important Question of Federal Law Involved.

The petition is devoted almost entirely to an attempt to show that the decisions below were erroneous. Such a demonstration, even if successful, would not call for granting the petition.[1]

A consideration of the facts as hereinbefore correctly stated makes it abundantly clear that no questions of general importance are involved. Petitioners' counterclaims have been dismissed because they are precluded from proving a fact essential to their recovery by the judgment on respondents' first, second and fifth causes of action, on principles of *res judicata* and estoppel. Whether this determination be correct or erroneous, and respondents confidently assert it is correct, it manifestly is of no direct concern to anyone other than the petitioners. No one other than the parties to the judgment can possibly have it thus used against them, and no one other than petitioners could possibly have a claim based upon the alleged excessive terms of the contracts which the finding of the District Court holds were entirely disconnected from any conspiracy.

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[1]Supreme Court Rules, Rule 38, 5. Chief Justice Vinson, referring to a petition for certiorari, stated, "If it only succeeds in demonstrating that the decision below may be erroneous, it has not fulfilled its purpose." Speech before Amer. Bar Assn., Sept. 7, 1949.

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Petitioners attempt to show (Pet. 26-31) that the District Court held that "no conspiracy existed," in the Los Angeles area, and quote remarks in the Memorandum Opinion of the District Court out of context to prove this. The claimed effect of this alleged holding is to preclude others seeking to recover treble damages for injuries to their business as a result of alleged restraints imposed upon them by runs or clearances which they may contend grew out of conspiratorial arrangements effective in this same area. Aside from the obvious fact that these other claimants could in no wise be bound by any such holding it is apparent that the District Court's decision legitimately cannot be so construed in any event.

The decision of the District Court is found in the Memorandum Opinion read as an entirety and considered together with the findings, conclusions and the judgment [Tr. 70-111]. Considered in this context the remarks of the District Court emphasized by petitioners constitute no more than an expression of the view that since the prior run and the clearance afforded petitioners were not part of any conspiratorial arrangement, they were legitimate. The remarks quoted thus properly construed were merely a justification of these terms of the franchise, entered into, as the Court held, independently of any conspiracy.

There is, therefore, no basis for petitioners' assertion (Pet. 28) that the District Court has by inference nullified the authority of the decision of this Honorable Court in *United States v. Paramount Pictures, Inc.* The District Court did not pass on the question of whether the conspiracy described in *United States v. Paramount Pictures, Inc.,* existed in Los Angeles; it held only in re-

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sponse to petitioners urging that the contracts between petitioners and respondents were not part of or influenced by such conspiracy or any other conspiracy.[2]

II.

Decisions in District Court and Court of Appeals Are Clearly Correct.

Petitioners have vigorously assailed the correctness of the decisions of the District Court and the Court of Appeals as erroneous in several respects. None of the specifications of error are well taken.

A. The Finding of No Connection Between Any Conspiracy and Lease-franchise Is Res Judicata and Precludes Recovery Upon Counterclaims.

The District Court held that the lease and franchise were each a "valid and subsisting agreement in full force and effect" [Tr. 110, 111] because said Court had found that said agreements were in no way affected by or connected with any conspiracy between any persons whatsoever. It did not hold as claimed by petitioners (Pet. 24) that the "franchise was lawful standing alone" which is merely to say that considered apart from the question of conspiracy, it *would be* lawful. Rather it held the lease-franchise *was* lawful *because* it was not part of a conspiracy.

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[2]It is apparent that the Court reasonably so found, in view of the fact that by the franchise and lease petitioner Partmar, an independent exhibitor [Tr. 101], was admitted to, rather than excluded from, the first run exhibition of motion pictures in this area, and given the advantages of run and clearance commensurate therewith.

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The issue of the *connection* between any conspiracy and the lease-franchise was and is an issue common to both the first, second and fifth causes of action of the complaint and the first, second and fourth counterclaims.

The larger issue of the legality of the lease and franchise was properly raised by the pleadings on the first, second and fifth causes of action [Tr. 3-26, 8, 9, 13].

> *South Side Theatres v. United West Coast Theatres Corporation,* 178 F. 2d 648 (9th Cir., 1949).

Moreover, this issue was tendered in arguments on motions for summary judgment one and one-half years prior to the trial [Tr. 113-114] and by respondents' opening statement [Tr. 119-120]. Counsel for petitioners was advised by the Trial Court early in the trial of the first, second and fifth causes of action that it was essential to their defense that the lease and franchise be found to be legal [Tr. 142]. The question of their legality was therefore clearly a matter which was in issue[3] and which was

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[3]The introduction of this issue of the illegality of the lease and franchise did not, as claimed by petitioners (Pet. 22), involve enforcement of rights growing out of an illegal contract. The District Court held [Tr. 96-97] that the lease and franchise though separate documents, constitute a single inseverable agreement. If, therefore, the terms of the Franchise were illegal, the entire franchise-lease agreement was null and void. The owner of real property being occupied by a purported lessee pursuant to an illegal agreement is entitled to recover possession, and the process of affording such restitution is not enforcement of any rights growing out of the contract, but rather a recognition of the fact that the defendant has no rights by virtue of the contract which, so long as it is executory, can be repudiated. (*Glos v. McBride,* 47 Cal. App. 688, 690-691 (1920); *Green v. Frahm,* 176 Cal. 259

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adjudicated [Tr. 110-111]. The issue of the connection between any conspiracy and the lease-franchise agreement was, of course, as found by the Court [Tr. 103-104, 106], necessarily involved in the determination of this larger issue of the legality thereof.

Likewise, the issue of the *connection* between any conspiracy and the lease-franchise is necessarily raised by the petitioners' first, second and fourth causes of action. As stated (Pet. 25) the counterclaims are "based on the fact that they (petitioner Partmar) licensed the pictures and leased the theatre, that the *picture and theatre rentals* were affected by the conspiracy in restraint of trade." The picture and theatre rentals are terms of the franchise and lease. If said franchise and lease were neither the result of nor affected by any conspiracy, it is manifest that the same must be true of the picture and theatre rentals which were but terms of such franchise and lease.

(1917); *McKinney v. Andrews,* 41 Tex. Reports 363 (1874); *Hall v. Corcoran,* 107 Mass. 251, 256-257 (1871).

Of course, petitioners' claims in this respect relate only to whether the judgment on the first, second and fifth causes of action was placed upon an erroneous basis. This is a matter which can only properly be looked into in an appeal from said judgment on said first, second and fifth causes of action. The fact remains that whether or not the legality of the lease and franchise should have been determinative of petitioners' right to remain in possession, the Court would not have allowed them to remain in possession had it not found said lease and franchise were legal. Now that the judgment protecting their possession has become final, petitioners must accept it for what it is, a judgment that they were entitled to remain in possession and to continued performance of the lease and franchise because, and only because, said franchise and lease were legal in all respects.

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It is, of course, well settled that a judgment is conclusive, as to all facts which are in issue and which are adjudicated, against any party to the action in any subsequent proceedings whether on the same or different cause of action.

50 C. J. S. 168;

Lineker v. Marshall, 7 F. 2d 875, 878 (9th Cir., 1925).

The additional parties defendant to the counterclaims do not affect the conclusiveness of the findings as against petitioners who were all parties to the first, second and fifth causes of action.

Bernhard v. Bank of America, 19 Cal. 2d 807 (1942);

Hurley v. Southern California Edison Company, 183 F. 2d 125 (9th Cir., 1950);

Bruszewski v. United States, 181 F. 2d 419 (3rd Cir., 1950).

Aside from the applicability of the doctrine of *res judicata,* it is manifest also that petitioners are now estopped to assert that the provisions of the lease and franchise are part and parcel of the conspiracy alleged in their counterclaims, since they have successfully urged the exact contrary [Tr. 52, 56-57, 58], in the District Court, in defense of the first, second and fifth causes of action.

31 C. J. S. 381;

Chandler v. McKerral, 68 F. 2d 343 (7th Cir., 1934).

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B. No Genuine Issue Remained as to a Material Fact; Dismissal of Counterclaim Was Proper.

Since the issue of connection between any conspiracy and the terms of the lease and franchise essential to recovery on the counterclaims was *res judicata* against petitioners, it is apparent that there was no genuine issue as to this material fact. A summary dismissal of the counterclaims, therefore, was appropriate. (F. R. C. P., Rule 56(c).) Petitioners were afforded the substance of a hearing upon motion for summary judgment by the hearing to settle the findings, conclusions and judgment of which they were notified and at which they appeared and opposed the adoption thereof. Petitioners were duly advised by the opinion of the Court and by the submission of respondents' proposed findings of fact, conclusion and judgment [Tr. 94, 107-108] that the issue of summary disposition of their counterclaims was before the Court. The absence of a formal motion for summary judgment did not limit the Court's power in this respect.

> *Northland Greyhound Lines, Inc. v. Amalgamated Association, etc.*, 66 F. Supp. 431 (D. C. Minn., 1946);
>
> *Hooker v. New York Life Ins. Co.*, 66 F. Supp. 313 (N. D. Ill., 1946); rev. on other grounds, 161 F. 2d 852.

In any event, it is apparent that since the issue of connection between any conspiracy and the franchise and lease is *res judicata* against petitioners, they would never be able to recover on their counterclaims if they were

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permitted to go to trial thereon. Such being the case, any errors or defects concerning the procedure by which their counterclaims were dismissed could not effect the substantial rights of petitioners, and consequently, are not ground for reversal of the District Court judgment. (Title 28, U. S. C. A., Sec. 2111.)

CONCLUSION.

For the reasons hereinbefore stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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